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No. 81-2379

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

PHILLIP M. PROCTOR, et al., *Petitioners*,

v.

STATE FARM AUTOMOBILE INSURANCE COMPANY, et al., *Respondents*.

SUPPLEMENTAL BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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MISCELLANEOUS:

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Pursuant to Sup. Ct. R. 22.6, Petitioners Phillip M. Proctor, *et al.* respectfully submit this supplemental brief in support of their Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. The Petition for Certiorari was docketed on June 28, 1982.

On that same day, this Court issued its opinion in *Union Labor Life Insurance Co.* v. *Pireno* and *New York State Chiropractic Association* v. *Pireno*, 50 U.S.L.W. 4911 (Nos. 81-389 and 81-390) (U.S. June 29, 1982) [hereinafter cited as *Pireno*]. Petitioners submit that *Pireno* necessitates either summary reversal of the Circuit Court's opinion, or at the very least, the issuance of the requested Writ.

PIRENO MAKES CLEAR THAT NO ONE OF THE *ROYAL DRUG* CRITERIA IS IN AND OF ITSELF DETERMINATIVE AND THAT THE EFFECT OF AN INTRAINDUSTRY AGREEMENT ON OTHER MARKETS IS IMPORTANT.

Pireno involved a claim of price fixing in violation of Section 1 of the Sherman Act. The Union Labor Life Insurance Company ("ULL") issued certain health insurance policies which covered insureds for chiropractic services and limited reimbursement to "reasonable" charges for "necessary" care. To determine whether chiropractic treatment and fees were reasonable and necessary, ULL used the Peer Review Committee of the New York State Chiropractic Association. That committee is composed of practicing chiropractors. Pireno, a New York chiropractor, had certain of his patients' claims referred to the committee which found some of the claims unreasonable or unnecessary. Pireno complained that the use of the peer review committee violated section 1 of the Sherman Act because the committee fixed prices for chiropractic services. The only question presented on appeal was whether ULL's use of the peer review committee was exempt from antitrust scrutiny through § 2(b) of the McCarran-Ferguson Act as the "business of insurance."

The Court reviewed *Group Life & Health Insurance Co.* v. *Royal Drug*, 440 U.S. 205 (1979) [hereinafter cited as *Royal Drug*], and reiterated the three *Royal Drug* criteria.

> In sum, *Royal Drug* identified three criteria relevant in determining whether a particular practice is part of the 'business of insurance' exempted from the antitrust laws by § 2(b): *first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry. *None of these criteria is necessarily determinative in itself* . . . .

50 U.S.L.W. at 4913 (emphasis added).

As far as the first criterion is concerned, the Court found that the use of the committee was not a "part [of] the 'spreading and underwriting of a policyholder's risk.' " 50 U.S.L.W. at 4913, *quoting Royal Drug*, 440 U.S. at 211. The Court rejected ULL's argument that the use of the committee was an aid to determine whether the risk has been transferred and the scope of the transfer. The Court focused on the contract of insurance as the vehicle by which risk is transferred.

> We find no merit in this argument, because the challenged peer review arrangement is logically and temporally unconnected to the transfer of risk accomplished by ULL's insurance policies. The transfer of risk from insured to insurer is effected by means of the contract between the parties—the insurance policy—and that transfer is complete at the time that the contract is entered. . . . If the policy limits coverage to 'necessary' treatments and 'reasonable' charges for them, then that limitation is the measure of the risk that has actually been transferred to the insurer. . . .

50 U.S.L.W. at 4913.

So too in *Proctor* v. *State Farm Mutual Automobile Insurance Co.*, 675 F.2d 308 (D.C. Cir. 1982) [hereinafter cited as *Proctor II*], the risk of loss was transferred from the automobile drivers/owners to the insurance companies at the time the contract of insurance was signed. The arrangement at issue in *Proctor II* thus fails to satisfy the first *Royal Drug* criterion for exemption.

The Court found that the use of the committee was not an integral part of the policy relationship between the insured and the insurers. The use of the committee was obviously distinct from the contracts with the insureds. Decisions as to whether claims presented are covered by the insurance policies are made by ULL alone and the use of the committees "as an aid in its decision-making process is a matter of indifference to the policyholder, whose only concern is *whether* his claim is paid, not *why* it is paid." 50 U.S.L.W. at 4914. The most ULL had established was that the use of the peer review committee might result in cost savings which might be reflected in lower premiums if passed on to the policyholders. Similarly, a deci-

sion by insurance companies to pay only a certain rate for automobile repair work is also a decision which is "obviously distinct" from contracts with insureds. Like the arrangement in *Pireno*, the arrangement in *Proctor II* fails to satisfy the second *Royal Drug* criterion for exemption.

The third criterion for exemption was not satisfied in *Pireno* because "the challenged peer review practices are not limited to entities within the insurance industry." *Id.* The Court reiterated the *Royal Drug* analysis that "§ 2(b) was intended primarily to protect '*intra*-industry cooperation' in the underwriting of risks. 440 U.S., at 221 (emphasis added)." 50 U.S.L.W. at 4914. The Court said that arrangements between insurance companies and parties outside the insurance industry "may prove contrary to the spirit as well as the letter of § 2(b), because they have the potential to restrain competition in non-insurance markets." *Id.*

The Court therefore looked not only at the terms of the agreement itself, but also at the effect the agreement might have in non-insurance markets. In *Proctor II*, the agreement, although made without the cooperation of the auto body shops, effectively fixed their rates and destroyed their ability to compete for business on the basis of price.

Pireno indicates that the courts must look to the substance and effects of insurance company agreements before a determination can be made that they qualify for exemption under § 2 of the McCarran-Ferguson Act. Labelling an agreement as "horizontal" or "vertical" and finding that label conclusive of the issues involved is impermissible under *Pireno*.

Therefore, Petitioners respectfully request that this Court either summarily reverse the Court of Appeals' decision or issue a Writ of Certiorari.

Respectfully submitted,

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